84-2027

No. ____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Paul Ruiz and Earl Van Denton ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH CIRCUIT ERRED IN FINDING THAT NO PROCEDURAL BAR EXISTED TO PRECLUDE ITS CONSIDERATION OF RUIZ AND DENTON'S SIXTH AMENDMENT CLAIM.

II.

WHETHER THE EIGHTH CIRCUIT ERRED IN FINDING THAT THE DEATH-QUALIFICATION OF RUIZ AND DENTON'S JURY VIOLATED THE SIXTH AMENDMENT REQUIREMENT OF A FAIR CROSS-SECTION OF THE COMMUNITY AND THAT SUCH JURIES ARE CONVICTION PRONE.

III.

WHETHER THE EIGHTH CIRCUIT ERRED IN APPLYING *MABRY V. GRIGSBY* RETROACTIVELY TO RUIZ AND DENTON'S CASE.

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No. ____

In the
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A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Paul Ruiz and Earl Van Denton ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985), and is reprinted in Appendix A to this petition. The District Court did not issue a written opinion of its findings. However, a transcript of the court's findings of fact and conclusions of law which were issued from the bench on April 27, 1983, is attached as Appendix B to this petition. The order of the District Court denying the habeas petition and entered on July 19, 1983, is attached as Appendix C to this petition. A subsequent Memorandum and Order denying the habeas petition and entered on August 24, 1983, is attached as Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1985. A petition for rehearing was not filed. On April 10, 1985, Justice Harry A. Blackmun entered an order extending the time for filing a petition for a writ of certiorari in this case to and including June 29, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

In 1982, the United States District Court for the Eastern District of Arkansas properly assumed jurisdiction of this habeas corpus action pursuant to 28 U.S.C. §2254.

In 1979, Ruiz and Denton were convicted of capital felony murder in the Circuit Court of Conway County, Arkansas and were sentenced to death. They were tried by a "death-qualified" jury from which all persons who refused to consider the death penalty had been excluded.

In the habeas petition filed in the District Court, Ruiz and Denton claimed among other things that their Sixth Amendment right to a fair trial had been violated by the death-qualification of their jury because it resulted in a guilt prone jury and one that was unrepresentative of the community. Ruiz and Denton raised fourteen separate issues to the Court. All of the issues raised by them were ultimately resolved against them by the District Court when their habeas petition was denied. In rejecting the Sixth Amendment claim, the court held that the issue was barred from consideration in a federal habeas proceeding by Ruiz and Denton's failure to raise the issue on appeal. The District Court went on to note that because the evidence against Ruiz and Denton was so overwhelming, a non-death-qualified jury would have reached the same result as to guilt and, thus, that no prejudice could be demonstrated. Appendix B at B-5—B-6.

The Eighth Circuit reversed the District Court and ordered that the writ of habeas corpus be granted unless the State retries Ruiz and Denton. *Ruiz v. Lockhart*, 754 F.2d 254, 255-56 (8th Cir. 1985). The court held that Ruiz and Denton's case was governed by its opinions in *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985), decided the previous day, and *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985), decided the same day. In *Grigsby*, the court held that "death-qualified" juries are not fairly representative of the

community and are not impartial on the question of guilt or innocence. In *Woodard*, the court held that since the *Grigsby* rule directly affected the truth-finding function of the jury, it is to be applied retroactively to cases that were tried before *Grigsby* was handed down.

The Court also held that no procedural bar existed to prevent it from reaching Ruiz and Denton's Sixth Amendment claim. Ruiz and Denton did raise the Sixth Amendment issue at their trial but did not argue it on appeal. In reversing the District Court's finding of a procedural bar, the Eighth Circuit found that the issue was not barred from federal habeas review because, in its view, the Arkansas Supreme Court had considered and rejected Ruiz and Denton's Sixth Amendment claim on its merits. *Ruiz*, 754 F.2d at 256.

The Eighth Circuit has stayed its order that Woodard be retried or released pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S RULING THAT RUIZ AND DENTON'S *GRIGSBY* CLAIM WAS NOT PROCEDURALLY BARRED DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Much to the State's dismay, the Eighth Circuit held that Ruiz and Denton's claim, pursuant to *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), that the death-qualification of their jury violated the Sixth Amendment's requirement of a fair cross section and that such juries are conviction prone, was not barred from consideration by a federal court on habeas corpus review. The court reversed the District Court on this issue. Specifically, the Eighth Circuit found that the Arkansas Supreme Court had considered and rejected the *Grigsby* claim on its merits and, thus, that no procedural bar existed by virtue of *Ulster County Court v. Allen*, 442 U.S. 140 (1979). *Ruiz*, 754 F.2d at 256.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) and *Engle v. Isaac*, 456 U.S. 107 (1982), this Court recognized that a defendant who failed to raise an issue in violation of a state rule of procedure requiring a timely objection, so that the issue was never disposed of on its merits by the state court, could not thereafter have the issue determined in a federal habeas corpus proceeding unless he established "cause" for the failure to raise the matter properly and "actual prejudice" as a result of the default.

As noted, the District Court had found that Ruiz and Denton's *Grigsby* claim was waived by them when it was not argued on appeal. It is clear that Arkansas follows the rule that an issue not raised at trial or on direct appeal in compliance

with state rules of procedure is deemed waived or barred. *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980).

In this case, Ruiz and Denton did raise the Sixth Amendment claim to the trial court. However, on appeal to the Arkansas Supreme Court, they listed the issue as an objection that was "raised" at trial, but did not argue that it involved reversible error. In fact, no argument was presented at all on this issue. This listing was done in compliance with Ark. Sup. Ct. R. 11(f), Ark. Stat. Ann. Vol. 3A (Repl. 1977), which requires that, in all cases when the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant and that the appellant must abstract all objections that were decided adversely to him in the trial court.

The opinion of the Arkansas Supreme Court, *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, *cert. denied*, 454 U.S. 1093 (1981), did not mention the *Grigsby* issue. It did not state that the issue was being rejected on its merits or that it was procedurally barred. However, in compliance with its Rule 11 (f), the court noted at the end of its opinion that the appellant had cited and commented on many objections raised below but which were not argued on appeal. Without further discussion, the court stated that it did not find that any of the points involved prejudicial error. *Ruiz*, 273 Ark. at 106, 617 S.W.2d at 13.

The Eighth Circuit held such treatment by the Arkansas Supreme Court to be a disposition of the *Grigsby* issue on its merits. The State cannot agree with this holding. Such a finding means that an issue not argued by the appellant or by the State and not discussed by the court is deemed to have been disposed of on its merits so that the issue is cognizable upon federal habeas review. The State asserts that such a holding does great damage to the concept of the procedural bar and must not stand.

The procedure outlined in Rule 11(f) is an added guarantee to a defendant that a possible point of prejudicial

error will not be overlooked in his appeal when the consequences are great. The extent of such review by the court is admirable. Nevertheless, the State refuses to accept that such a procedure can have the effect of voiding the concept of procedural bar. By the Eighth Circuit's interpretation of Rule 11(f), all issues raised before the trial court and ruled adversely to the defendant are reviewed by the Arkansas Supreme Court on direct appeal and disposed of on their merits even when not argued by the parties or mentioned by the court in its opinion.

The State asserts that the idea behind the procedural bar doctrine is to preclude federal review of constitutional claims where the state courts did not pass on them unless cause and prejudice can be demonstrated. Surely the procedure outlined in Rule 11(f) cannot be construed as a review of an issue on its merits in every instance. Ruiz and Denton must be required to establish "cause" and "prejudice" before federal review of their Sixth Amendment claim is permitted.

Irrespective of how this Court should ultimately decide the substantive issue raised in *Grigsby*, it is crucial that the procedural bar issue raised in this case be clarified by this Court because the lower court's holding will affect procedural bar issues in many future habeas cases and not just cases raising the *Grigsby* issue.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS GROUNDED UPON ITS HOLDING IN *MABRY V. GRIGSBY* AND THAT CASE PRESENTS SIGNIFICANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

The Eighth Circuit decided Ruiz and Denton's case on the basis of its holding in *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985), *petition for cert. filed sub nom Lockhart v. McCree*, ____

U.S.L.W. ____ (U.S. May 29, 1985) (No. 84-1865), and *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985) (petition for cert. being filed contemporaneously with this petition). The identical issue is also pending before this Court in *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187).

In *Grigsby*, the Eighth Circuit found that a capital jury with *Witherspoon*-excludables stricken for cause, is conviction prone and, therefore, does not constitute a cross-sectional representation in a given community. The court held Arkansas' method of jury selection in capital murder cases to be unconstitutional under the Sixth Amendment. The Eighth Circuit was addressing the question left open in *Witherspoon v. Illinois*, 391 U.S. 510, 520 n. 18 (1968): whether a "death-qualified" jury, i.e. a jury with those persons stricken for cause who state a *voir dire* that they would refuse to consider capital punishment, is "less than neutral with respect to *guilt*." (Emphasis original.)

In *Woodard*, the Eighth Circuit held that since the *Grigsby* rule directly affected the jury's truth-finding function it would apply retroactively to cases which had been tried before *Grigsby* was handed down.

Thus, the issue in *Grigsby*, and consequently in *Woodard* and Ruiz and Denton's case, presents significant justification for this Court's review. As was noted in the petition for certiorari in *Lockhart v. McCree*, the Eighth Circuit's opinion in *Grigsby* has created a conflict among the federal circuit courts of appeals. *See McClesky v. Kemp*, 753 F.2d 877, 901 (11th Cir. 1985); *Keeten v. Garrison*, 742 F.2d 129, 134 (4th Cir. 1984); *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-95 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The *Grigsby* decision is in direct conflict with decisions of the Arkansas Supreme Court. *Hendrickson v. State*, No. CR

84-164 (Ark. April 29, 1985); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983).

Also, the Eighth Circuit's opinion in *Grigsby* erred in applying the decisions of this Court in holding that there was a cross-section violation by the exclusion of *Witherspoon*-excludables at *voir dire*, in applying cross-section analysis to petit juries, and in finding *Witherspoon*-excludables to be a cognizable group subject to cross-section analysis.

The Eighth Circuit also erred in failing to recognize the State's legitimate interest in excluding *Witherspoon*-excludables, a right clearly acknowledged by this Court. *Wainwright v. Witt*, 105 S.Ct. 844 (1985). Finally, the Eighth Circuit improperly relied on evidence in the form of social science studies and surveys in concluding that "death-qualified" juries are conviction prone.

Because the disposition of this portion of this petition is dependent upon the Court's disposition of the petitions in *McCree* and/or *Keeten*, the petitioner asks that this portion of this petition be held until final disposition of one or both of the above named cases or that it be consolidated therewith on this issue.

The issue to be raised subsequently in this petition will either become moot by the Court's disposition of *McCree* and/or *Keeten* or will need to be revolved because of the Court's decision in one or both of those cases.

III.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE EIGHTH CIRCUIT HAS IMPROPERLY INTERPRETED THIS COURT'S DECISIONS IN APPLYING *MABRY V. GRIGSBY* RETROACTIVELY.

After its ruling in *Grigsby*, the Eighth Circuit was immediately faced with whether to apply the ruling retroactively in *Woodard*. The court relied on decisions of this Court to hold that *Grigsby* should be afforded "fully retroactive application." *Woodard*, 753 F.2d at 697. In accordance with *Woodard*, *Grigsby* was applied retroactively to this case. *Ruiz*, 754 F.2d at 256.

The Eighth Circuit relied heavily on the retroactivity analysis of *Witherspoon* finding it to be "virtually on all fours with [Woodard's] case." *Woodard*, 753 F.2d at 696. In *Witherspoon* this Court held in essence that the exclusion of those persons from a capital murder jury with conscientious scruples against the death penalty resulted in a jury that was partial on the issue of *punishment*. The Eighth Circuit has now held in *Grigsby* that the exclusion of those persons from a capital murder jury who would refuse to consider the death penalty results in a jury that is partial on the issue of *guilt-innocence*. Although the Eighth Circuit stated that its holding in *Grigsby* was foreshadowed in *Witherspoon*, the holdings are markedly different and *Grigsby* does not necessarily follow from *Witherspoon*.

Woodard identified the three factors that must be considered in applying a judicial decision retroactively: (a) the purpose to be served by the new rule; (b) the extent to which law-enforcement authorities have relied on an older rule of law, and (c) the effect on the administration of justice of a retroactive application of the new rule. *Woodard*, 753 F.2d at 695, *citing Solem v. Stumes*, 104 S.Ct. 1338, 1341 (1984). This Court had utilized the same factors in *Witherspoon*. *Id.*, 391 U.S. at 523 n. 22.

The Eighth Circuit stated that, "we see no relevant difference between these two rules [*Witherspoon* and *Grigsby*] for purposes of the Supreme Court's retroactivity criteria." *Woodard*, 753 F.2d at 696. However, the court seemingly ignored a major distinction between *Witherspoon* and *Grigsby*. *Witherspoon* invalidated only

the sentence in that case. *Grigsby* has the effect of invalidating the conviction. Those inmates successfully raising the *Grigsby* issue must be retried or set free. The State asserts that *Grigsby* would have a significantly greater impact on the administration of justice, if upheld and applied retroactively, than did *Witherspoon.*

Additionally, the Eighth Circuit states that it "doubt[s] that law-enforcement officials are markedly more surprised by *Grigsby* . . . than they were by *Witherspoon* . . . " *Woodard,* 753 F.2d at 696. The State strongly disagrees with this statement. From *Witherspoon* through *Wainwright v. Witt,* 105 S.Ct. 844 (1985), this Court has consistently approved of the *Witherspoon* process of excluding those persons from capital murder juries who state that they will not consider the death penalty. Prosecutors in Arkansas (and across this country) have strongly relied on the rule of law which existed prior to *Grigsby* (and still exists in every other federal circuit).

The State asserts that the effect on the administration of justice of *Grigsby's* new rule and the extent of the reliance on the rule followed prior to *Grigsby* would strongly outweigh its retroactive application to this case, if *Grigsby* is upheld.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Paul RUIZ and Earl Van Denton, Appellants,

v.

A. L. LOCKHART, Director, Arkansas Department of Correction, and Steve Clark, Attorney General of Arkansas, Appellees.

No. 83-2319.

United States Court of Appeals, Eighth Circuit.

Submitted July 6, 1984*.
Decided Jan. 31, 1985.

Ron Heller, Hollingsworth & Heller, P.A., Little Rock, Ark., for appellants.

Steve Clark, Atty. Gen., by Victra L. Fewell, Asst. Atty. Gen., Little Rock, Ark., for appellees.

Before McMILLIAN, BENNETT** and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

The appellants Paul Ruiz and Earl Van Denton were charged with capital felony murder, convicted, and sentenced to death by the jury. The District Court dismissed their

*This case was argued on May 15, 1984, but not finally submitted to the panel for decision until July 6, 1984, when the last post-argument brief was filed with leave of court.

**The Hon. Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by

petition for habeas corpus. They appeal, arguing, among other things, that because their jury was "death-qualified" it was neither impartial nor a representative cross-section of the community. This case is governed by our decisions in *Grigsby v. Mabry*, ____ F.2d ____, No. 83-2113 (8th Cir. Jan. 30, 1985) (en banc), and *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985). We therefore reverse the judgment and remand the cause with directions to grant the writ unless the State, within such reasonable time as the District Court may fix, commences proceedings to retry the appellants. [1]

I.

In *Grigsby* we held that the exclusion for cause of jurors who hold absolute scruples against the death penalty creates a conviction-prone jury. Such a jury is not a representative cross-section of the community, nor is it impartial on the issue of guilt or innocence. *Grigsby*, at _____, ____, ____. And in *Woodard* we held that the *Grigsby* rule directly affected the truth-finding function of the jury and therefore is to be applied "retroactively" to cases, such as Ruiz's and Van Denton's, that were tried before *Grigsby* was handed down. *Woodard*, at 696.

The State argues that even if *Grigsby* is correctly decided and applies to this case, appellants are still entitled to no relief because they did not properly preserve their *Grigsby* point in the state courts. Appellants reply that the point was properly preserved, and that even if it was not they can satisfy the cause-and-prejudice requirement of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and so should be allowed to raise the issue in this federal habeas proceeding. We hold that the *Grigsby* argument was actually rejected on its merits by the Supreme

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1 We do not reach the other legal challenges asserted by Ruiz and Van Denton, and express no view on the merits of these points.

Court of Arkansas. It is therefore open on federal habeas, entirely apart from whether "cause" and "prejudice" can be shown. *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

The parties have greatly aided our consideration of this procedural question by stipulating as to the course of proceedings in the state courts. They agree that the "*Grigsby* issue" was raised at trial. Designated Record (D.R.) 21. (In fact, defendants asked leave to introduce evidence on the question of conviction-proneness, and the state trial court, believing itself bound by an opinion of the Supreme Court of Arkansas, declined to hear the evidence. R. 502-03. [2]). The State argues, however, that the issue was waived when defendants' counsel did not press it on the direct appeal from their conviction.

Defendants' brief contained seven major argument headings. The last one read in substance as follows:

> G. OTHER OBJECTIONS RAISED DURING THE TRIAL BUT NOT ARGUED ON APPEAL.
>
> 1. Whether a death-qualified jury is prosecution prone (*Grigsby* issue).

D.R. 21. The *Grigsby* point was thus mentioned in the brief as an objection that had been made at trial, but the brief contained no legal argument in support of it. It was simply stated as one issue in a five-page list containing every ruling adverse to the defendants that had been made by the trial court. Certainly the State would be within its rights in adopting a rule of procedure

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This reference is to the transcript of the trial in the Circuit Court of Conway County, Arkansas, as paginated in the record on appeal to the Supreme Court of Arkansas in *Ruiz & Van Denton v. State*, 273 Ark. 94, 617 S.W.2d 6, *cert. denied*, 454 U.S. 1093, 102 S.Ct. 659, 70 L.Ed.2d 631 (1981).

that would preclude appellate consideration of a point so cursorily made in a brief. The question facing us, through, is not what rules of procedure the State may adopt, but what rules it has adopted and invoked to preclude consideration of the point appellants now urge upon us.

The answer to this question is in the opinion of the Supreme Court of Arkansas. The opinion does not mention the *Grigsby* point in so many words, either to reject it on the merits or to hold it procedurally waived because not argued in the brief, but it concludes with the following statement:

> Counsel for appellants and for appellee, following our rules, have cited and commented on many objections raised below but not argued on appeal. It would be of no value to list them singly as we find no prejudicial errors.

273 Ark. at 106, 617 S.W.2d at 13. We think this is a holding on the merits, designed to encompass all those points, including *Grigsby*, listed but not argued under appellants' heading G, quoted above. This refusal to rest on a procedural waiver, this willingness to consider any point properly made at trial, even though not argued in the brief on appeal, is in fact the normal practice of the Supreme Court of Arkansas in capital cases. *E.g., Singleton v. State*, 274 Ark. 126, 133, 623 S.W.2d 180, 183 (1981); Ark. Stat. Ann. §43-2725 (Repl. 1977). When life is at stake, that Court has long taken the trouble to make its own examination of the record and reject or accept on their merits all objections made at trial, whether or not pressed in the appellants' brief. This is what happened here: the *Grigsby* argument, having been properly preserved in the trial court, was considered and decided on the merits by the Supreme Court, despite the absence of argumentation in appellants' brief. It is therefore not barred on federal habeas.

II.

The District Court explained its holding against appellants as follows:

> Although petitioners raised the objection in the State proceeding that a death qualified jury is guilt prone, the preservation of the issue is of no avail unless they can demonstrate prejudice. This Court has carefully reviewed the transcript of petitioners' trial and is firmly convinced that the proof of their guilt was overwhelming. The evidence presented against petitioners would lead any rational juror, death qualified or not, to the conclusion that petitioners committed the offenses with which they were charged.

Ruiz & Van Denton v. Lockhart, No. PB-C-82-376 (E.D. Ark. Aug. 25, 1983), slip op. 2.

We do not agree with this statement of the law. The right to be tried by an impartial and representative jury is basic. "The underrepresentation of a distinct group from a petit jury brought about by systematic challenge for cause affects the integrity of the entire jury system and no actual prejudice need be shown." *Grigsby v. Mabry, supra*, at ____. As the Supreme Court said in a similar context in *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927):

> It is finally argued that the evidence shows clearly that the defendant was guilty . . . and therefore that he can not complain of a lack of due process . . . . No matter what the evidence was against him, he had the right to have an impartial judge.

So here, no matter what the evidence was against them, Ruiz and Van Denton had the right to an impartial jury, not one composed of a group whose attitudes make them more conviction-prone than the public at large.

Pickens v. Lockhart, 714 F.2d 1455, 1458 n. 2 (8th Cir. 1983), is not to the contrary. We rejected Picken's *Grigsby* claim because the evidence of his guilt was overwhelming. We did so, however, not because "prejudice" must always be shown in order to make a successful collateral attack, but because Pickens had not made the prone-to-convict argument either at

trial or at *any* stage of the proceedings in the state courts. In order to make his *Grigsby* argument on federal habeas, therefore, Pickens had to show both "cause" and "prejudice." Because his guilt was overwhelmingly established by the evidence, he could not show "prejudice." But here Ruiz and Van Denton did preserve their argument properly in the state courts and receive a decision from the Supreme Court of Arkansas rejecting it on its merits. They do not have to show "cause" and "prejudice" to get past the door of the habeas court. Their impartial-jury claim is presented head-on; it is not merely seen darkly through a *Wainwright* glass. And on such a claim prejudice in the individual case has no bearing.

III.

We are well aware that the result reached in this opinion will impose substantial expense and inconvenience on the State. These consequences are regrettable, but they are, in our view, required in order to ensure that appellants are tried by an impartial jury, and the more so in a case involving life and death. Our governments, federal and state, are limited by written constitutions, a vital part of which is the Bill of Rights. It is our duty to enforce that document strictly. In doing so, we are disagreeing with our Brothers on the Supreme Court of Arkansas. It is, we hope, unnecessary to say that our disagreement implies no disrespect. That Court, like this one, is sworn to uphold the Constitution of the United States, and it does its duty case by case, just as we do. Having reached a conclusion after full reflection at variance with that of the Supreme Court of Arkansas, we cannot shirk the duty to say so.

The judgment is reversed, and the cause remanded to the District Court with directions to grant the writ of habeas corpus unless the State commences proceedings to retry Ruiz and Van Denton within such reasonable time as the District Court may fix.

It is so ordered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION
FINDINGS OF FACT ISSUED FROM THE BENCH

Paul Ruiz and Earl Van Denton — Petitioners

VS. — No. PB-C-82-376

A. L. Lockhart, Director,
Arkansas Department of Correction,
and Steve Clark, Attorney General
of the State of Arkansas — Respondents

TRANSCRIPT OF CONCLUSIONS OF LAW AND FINDINGS OF FACT ISSUED FROM THE BENCH APRIL 27, 1983

MS. FEWELL: Your Honor, the State's position on Grigsby, there's no reason to delay a decision on the other issues. There has been at least one other case that has already gone to the Eighth Circuit, the McCree case that was actually consolidated with Grigsby, and tried on that issue the same time the Grigsby issue. That one issue may be held in abeyance, but it doesn't preclude the disposition of the other issues and even the appeal on the other issues.

It's the State's position here today that petitioners have not made their case on the one issue that was tried. They have not established that there was, in fact, any kind of conflict, and, if so, what that might have been, and if there was one, that it could have possibly have prejudiced either of them in the penalty phase. And there is no reason to delay a decision in this case.

THE COURT: I tend to agree that there is no reason to delay a decision. All the issues have been briefed. The record has been made all the way through. I have read the trial

transcript. So I don't think there is any point in delaying a decision on the issues.

Taking the issues as they have been raised, and I will take first the argument that petitioners made that the capital felony murder statute and the first degree statute are overlapping and, therefore, unconstitutionally vague. Essentially this argument is that the statutes permit an arbitrary enforcement of the death penalty under the statute, and cite Beck and Alabama as support for that proposition.

I don't think the Beck case is applicable in this situation, because in the Beck case, the Alabama jury only had the options of either an outright acquittal or a conviction with a death penalty, where the death penalty was mandatory.

In this case, the jury had a number of options under the statute. To begin with, they had the option of capital felony murder, with or without the death penalty.

Furthermore, the instructions were submitted to the jury on first degree murder. And, if I recall, there was even a second degree murder instruction, which the prosecuting attorney agreed could be given. And I think they decided not to give it, simply because there was no possibility the jury would ever return that particular finding. But, nevertheless, this issue has been exhaustively reviewed by the Arkansas Supreme Court, and it was reviewed in this particular case on the second appeal. And I agree with the opinion of the Arkansas Supreme Court. I don't think that the capital felony murder statute, that is Arkansas Statute, Section 41-1501 A, has any constitutional infirmity and certainly not one along the lines of the opinion in the Beck versus Alabama case.

There was an issue raised about the extensive pre-trial and trial publicity for the second trial. There is a contention that the publicity denied a right to a fair trial.

Of course, going back over this case, the first trial was reversed; the first conviction was reversed and remanded because there was not a change of venue. The case was not actually tried until almost two and a half years after the crime was committed. They were re-tried in a county that was located furtherest in the district from the point of the offense.

There is simply no evidence in the record that there was that pervasive prejudicial type pre-trial publicity which would have prevented a fair trial. Simply because, of course, there is some publicity or a news account about the offense or the trial itself, that's not sufficient evidence to presumptively—or use to conclude that the defendants were denied due process in any way.

There is a burden upon the petitioners to show that a fair trial was denied because there was an inherent prejudice from the publicity.

In this case, there is simply not any substantial evidence that that was the case.

And from a review of the totality of the record, including the voir dire of the jurors, I conclude that the petitioners have failed to meet the burden to demonstrate that they were denied a fair trial because of pre-trial publicity.

There was an allegation made—a third allegation was made by the petitioners in the pending petition that the offenses should have been severed for purposes of the trial. In other words, they were charged in the same charge with the death of Opal James and the death of Marvin Ritchie. In the death of Marvin Ritchie, of course, it was alleged they committed that murder while committing a robbery and also a kidnapping.

Petitioners contend that since the charges concern the murder of two persons on separate days in separate coun-

ties, they should have been – they were separate crimes and should have been severed and tried separately.

Of course, Rule 21.1 B of the Arkansas Rules of Criminal Procedure permit the joinder of two offenses in one information when they are based upon – and the quoted language is "a series of acts connected together." And the Arkansas Supreme Court found that all three of these men who were involved, or the victims of these offenses, were taken prisoner within a brief period of time. They were robbed, kidnapped; they were transported some distance to a drainage ditch, where Opal James actually witnessed the shooting of Ritchie and David Small. And the fact that James' death did not occur at the same time as the death of Ritchie certainly doesn't disconnect it from one criminal episode. And the only reason that Mr. James, as disclosed from the record, was not killed at the same time Mr. Ritchie was killed and Mr. Small was shot is because, according to the record, Mr. James was familiar with the area, and they needed a guide to show them some roads. And, otherwise, there's no reason to believe that James wouldn't have been killed at the same time Ritchie and the same time Mr. Small was shot.

In any event, the Arkansas Supreme Court found that there was ample evidence to connect the offenses and that they were properly joined for trial. And, certainly, I'll defer to the weight that is properly given that sort of finding by the Arkansas Supreme Court, and will also say that I concur completely in that decision. I think the evidence is overwhelming that these offenses, both the death of Mr. James and the death of Mr. Ritchie, occurred as a series of acts connected together within the meaning of the Arkansas Rules of Criminal Procedure.

In any event, I find no basic or inherent unfairness because these two deaths were tried as one criminal act or in one charge.

Petitioners contend they were denied their Sixth Amendment right to a fair trial, of course, because of the death qualification process used in Arkansas; that it is calculated to produce what you have alleged is a guilt-prone jury.

Of course, in this case, the petitioners at the trial requested a hearing on that issue, and it was denied. So to that extent the issue cannot claim to have been waived as it has been in some other cases.

The point was not raised, however, on appeal to the Arkansas Supreme Court. It was not argued in that case on appeal and I think very probably the issue was waived at the appellant level because it was not raised before the Arkansas Supreme Court. I think that issue has been waived before the Arkansas Supreme Court.

There is another reason I don't think the guilt-prone argument has any merit in this case. It occurs to me that the guilt-prone jury or the fact that a jury has been death-qualified, and even assuming that it is more prone to find guilt than a non-death-qualified jury, that in this case, and after reading the transcript, the evidence is just absolutely overwhelming that these defendants were guilty of the offense.

Whether a jury was death-qualified or not death-qualified, the conclusion is just inescapable that they were guilty of these offenses. There were eyewitnesses and, as a matter of fact, one of the men they shot was an eyewitness.

I am not saying that all the testimony was not subject to cross examination, and there were questions raised about some of the eyewitnesses' identification of these defendants, but there were fingerprints, ballistics tests, and no real defense was ever raised to the actual commission of the offense itself by these defendants.

And, as I say, even if the argument was not waived on appeal to the Arkansas Supreme Court, which I think it was, whether the jury is death-qualified or not death-qualified, I don't think there is any rational way they could have reached a conclusion other than that these two defendants, based upon the evidence presented, were guilty of the offense with which they were charged.

What I am saying is, I am satisfied that a non-death-qualified jury would have reached the same result in the guilt phase of it. Of course, obviously, the jury met the Witherspoon test with respect to the penalty phase, so I don't think the non-death-qualified jury—it does not apply to that phase of the trial in any event.

As another point raised by petitioners, they contend their Sixth, Eighth, and Fourteenth Amendment rights were violated because three jurors were excused for cause when they expressed what petitioners classify as general doubts against the imposition of the death penalty.

The Arkansas Supreme Court found, of course, on appeal that all three of those jurors were excused for cause under the Witherspoon test. That conclusion, of course, is entitled to some deference but even aside from that, in reading the transcript of the voir dire of those jurors, I conclude that the three jurors indicated that they wouldn't vote for the death penalty under any circumstances. That was the clear impression I had. I tend to agree that any equivocation they may have had about that was a matter of semantics more than it was their true intent, and I think the trial court properly excused those jurors. And I think their responses failed to met the test of Witherspoon.

In summary, while I would defer to that sort of conclusion reached by the Arkansas Supreme Court, I also independently arrive at that conclusion from my own reading of the transcript.

The petitioners contend that one of—in a separate contention about the jurors, that their constitutional rights were violated when the trial court excused for cause three jurors because they were related to one of the secretaries who worked for one of the prosecuting attorneys who participated in the trial. I don't think there's anything at all to that argument. As a matter of fact, out of an abundance of caution, those jurors were excused. If anything, excusing those jurors inured to the benefit of the defendants. It certainly wasn't prejudicial to them. And I suppose, in summary, there is simply no showing that the exclusion of those jurors resulted in a tainted jury with respect to the jury which was finally composed.

The petitioners have presented no evidence of actual or potential prejudice from that dismissal of those three jurors. And, again, while the Arkansas Supreme Court made findings on that issue which are entitled to some deference, I will say that I have independently concluded that, after looking at that, I am in agreement with that decision.
sion.

The petitioners, as another point, contend that their constitutional rights were violated because they were not allowed to conduct this second voir dire of the jury after the guilt phase of the trial was completed. And the petitioners allege that a second voir dire was calculated to determine whether or not the jury could disregard evidence introduced during the penalty phase—or excuse me, during the guilt phase that was not relevant to the penalty phase and to determine whether or not the jury could consider both alternatives for punishment.

I would say, number one, that under the statutory scheme of things, and it's a statute—that's the capital penalty death statute—has been approved by the United States Supreme Court in at least two cases. That's Collins versus the State of Arkansas and Swindler versus the State of Arkansas. The guilt phase and penalty phase are to be

determined by the same jury. That, of course, is a fact that is well known to counsel before the trial starts. Counsel was given an opportunity to conduct an extensive voir dire, and that matter should have been reached in the voir dire before the jury was made up. And I don't know of any case authority or statutory scheme that would suggest that these defendants were entitled to a voir dire of the jury at the end of a guilt phase and before the beginning of the penalty phase.

As a matter of fact, it would be contrary to the expressed provisions of the statute.

Again, I adopt the finding of the Arkansas Supreme Court in that connection. And I will also say that separately and independently, after reviewing the issues, or that issue, I am in complete agreement with the Arkansas Supreme Court on that issue.

As a next and separate point, petitioners contend the jury ignored mitigating evidence presented during the penalty phase and improperly allowed—they were improperly allowed to consider pecuniary gain as an aggravated circumstance. Therefore, the death penalty was arrived at as a result of passion or prejudice.

And I'd say, first, there's nothing in the record to indicate that the jury ignored what mitigating evidence that was presented in the penalty phase. While it is true that the jury did not find any mitigating circumstances, that certainly doesn't matter that they disregarded the evidence. The jury is not required to find mitigating circumstances in the case.

And, in any event, I don't think there is any evidence, direct or from which it could be inferred, that the jury ignored the mitigating evidence in the case.

As a second part of that argument, petitioners claim that the jury erred in finding the existence of aggravated

circumstances, that is that the murder was committed for pecuniary gain.

The argument, of course, is made that since the aggravated robbery was an underlying element of the crime, it should not, again, be used to enhance the penalty phase of the case.

Whether that argument has any merit or not, and I don't think it does, it certainly doesn't make any difference in this case, because the jury found five aggravating circumstances and no mitigating circumstances. And under the statute, the aggravating circumstances must outweigh any mitigating circumstances in order to impose a death penalty. And I think that was clearly met in this case.

And, again and additionally to that, pecuniary gain is certainly an appropriate aggravating circumstance in a capital felony murder case.

There is a claim in the petition that the introduction of some black and white photographs of the victims, which were introduced during the guilt phase of the trial, were prejudicial. It's contended that the photographs so inflamed the jury that they were denied a fair and impartial jury during the penalty phase because of possible passion or prejudice.

The Arkansas Supreme Court addressed that issue in both appeals, first and second appeal, and found nothing about the pictures which were prejudicial. And pictures were certainly admissible as relevant evidence. And that finding is entitled to the presumption of correctness, and there's been no showing to overcome that presumption.

Aside from everything else, the introduction of the photographs was simply relevant evidence on the guilt phase of the case. And there is no indication or suggestion that it was not relevant and not properly admissible

evidence, and it was not re-introduced separately and independently in the penalty phase.

And I simply don't find any merit to that contention and agree with what the Arkansas Supreme Court had to say about it in both cases on appeal.

As a separate and independent allegation in the petition, petitioners contend the prosecutor made a prejudicial statement about Mr. Ruiz having been sentenced to life imprisonment in California on two occasions.

Again, the Arkansas Supreme Court looked at that. Furthermore, at the trial of the case, that was objected to and the jury was admonished to disregard the statement. And there is just no evidence in the record that any additional relief was requested at any time. And so any claimed error from that statement would have been waived long ago.

But, even aside from that, there is—the petitioners, in the penalty phase of the trial, stipulated the admission of their prior criminal records. And that information is in Mr. Ruiz's prison records and certainly it can be inferred from that. They stipulated to the admission of that evidence, so it can hardly be said the statements by the prosecuting attorney were unduly prejudicial.

Of course, there was a witness for the petitioners at the penalty phase who testified to conversations with Mr. Ruiz where Mr. Ruiz described his extensive periods of incarceration and criminal record. And that was related to the jury as part of the mitigation through his own mitigation witness. And, of course, when a defendant opens up his own prior criminal record, it's difficult to argue that there is prejudice in the fact that all that record comes before the jury.

The petitioners allege that the death penalty statute is unconstitutional because it discourages the Fifth Amendment right not to plead guilty and penalizes the exercise of the Sixth Amendment right to trial by jury. And that is, of course, because under the statutory scheme of the death penalty statute in Arkansas, only the jury can impose the death penalty.

And I suppose—Mr. Heller, correct me if I am wrong. But, essentially, this argument is that perhaps if they could go in and plead guilty to a judge to the offense, that the judge would be more inclined to not give them the death penalty if he could sentence them.

MR. HELLER: Well, partially that, but also, Your Honor, the fact that they ask for a jury trial means that they face the death penalty, where if they could have had a court trial only, since the death penalty can only be imposed by a jury, they are not guaranteed that same right. By exercising their right to a jury, they have to face a stiffer penalty than if they can just be tried to the Court.

THE COURT: Do you suggest by that, they are in some way entitled to a trial by the Court?

MR. HELLER: Yes, Your Honor.

THE COURT: Well, I knew the Constitution said that people were entitled to a trial by jury, but I didn't know that it says anywhere they are entitled to a trial by the Court. Does it?

MR. HELLER: Our contention is that you are entitled to a trial by jury, but if by exercising that constitutional right to a trial by a jury you face a stiffer penalty than had you not exercised that right, then it's an unfair infringement upon the exercise.

THE COURT: Well, that's a novel argument. I'll give you credit for coming up with one that I consider to be novel.

Well, in any event, this argument was never raised at the start of the trial; it was never made until this petition. But, first, there was never any indication that petitioners would have waived their right to a jury. And, secondly, there was never any suggestion that the defendants would have pled guilty or entered a plea of guilty. And there still has been no showing that that would have been the case. And there's been no demonstration of any actual or potential prejudice in this case. And I adopt the reasoning of the Arkansas Supreme Court on that issue.

MR. HELLER: For the record, Your Honor, we'd like to state, this issue was raised at the Rule 37 stage.

THE COURT: Okay. Well, what I was talking about is at the trial court level. At each trial, and there were two of them, there was never any indication they wanted to waive a jury, and there was never any indication that they were inclined to plead guilty. And I think that will effectively bar the raising of that particular claim at this point.

In any event, I agree with the Arkansas Supreme Court on that issue.

Petitioners also contend, of course, and that's what we had the hearing on today, that they were denied effective assistance of counsel because they were jointly represented by counsel in the penalty phase of the case. And I gather their argument is also, from the tenor of the questions asked by Mr. Heller, that nobody ever explained to them the importance of the separate representation at the penalty phase of the case or that it could be considered at that phase of the case.

And, apparently, the argument is also urged, and I gather this from the tenor of the questions, that there was never any real explanation to them about the bifurcated trial procedure to the extent that they fully understood and made a knowing and voluntary waiver of the right to separate counsel and separate hearings on that phase of the case.

Then, of course, there's also the argument that they were prejudiced because they were co-defendants and that the jury was perhaps unable to make distinctions between the two men when they were looking at the penalty phase of the case.

With respect to distinctions between the two, the jury made out separate verdicts on each defendant, could return separate findings. They were instructed by the trial court to consider the cases as to each defendant separately. And there has been no demonstration that they failed to follow those instructions.

With respect to the defendants' understanding of the case, I would say that two experienced, capable trial lawyers were appointed by the Court to represent these men, Mr. Laws and Mr. Cambiano. Mr. Laws, of course, has been practicing since—I've forgotten exactly what he said—over twenty years, and Mr. Cambiano has been practicing twenty-something years. They are both well known and respected attorneys and trial attorneys. Mr. Laws, of course, has been a prosecuting attorney for eight years; he has prosecuted and defended criminal cases involving murder allegations. And something about—or with respect to the suggestion that perhaps they aren't experienced in bifurcated trials, I can say that they are experienced trial lawyers.

And I don't think a lack of experience in trying a penalty phase of a trial is necessarily suggestive of ineffective assistance of counsel. After all, the statute hadn't been passed all that many years, and I doubt if there are many

lawyers around who have much trial experience under that particular scheme of things. But, certainly, that doesn't suggest that they were ineffective or incompetent or incapable of preparing and trying the case under the bifurcated situation.

I find as a fact, in connection with the allegations of ineffective assistance of counsel, that both Mr. Ruiz and Mr. Denton had the possible conflict of interest situation explained to them on any number of occasions, that they both understood the possible conflict caused by joint representation. They were offered separate representation; they got separate consultation from these attorneys. They wanted their case tried together; they wanted to remain together and certainly had no objections to remaining together through both the penalty—excuse me, the guilt and penalty phases of the trial.

There's been absolutely no showing that it worked to their prejudice to be tried together or that they received joint representation.

And, incidentally, in this case, they didn't have joint representation in the sense that they had one attorney representing both defendants in the usual sense of the way that issue comes up. In this case, they both were represented separately to the extent that they were consulted with by attorneys separately to glean out or turn up any possible area of conflict, any areas that where one would have had an advantage over the other. And there hasn't been one single word of evidence about how their cases would have been handled or tried any differently if they had been represented by complete and separate counsel and tried separately, as a matter of fact. So there's simply no evidence that there was any prejudice by the fact that they were tried together or that their cases were prepared together.

And I think, if there is any claim at all about the way they were represented, i.e., by being jointly, they certainly waived that.

And I think it is kind of interesting that after all the evidence was in and after both jury findings of guilt and the death penalty, they were asked if they were satisfied with their representation in this case, and both of them affirmatively stated on the record that they were satisfied with the representation they received.

Now, there was a suggestion about, that Mr. Ruiz—and this was simply a suggestion by the manner in which the question was asked, not by the evidence, that Mr. Ruiz was in some way prevented from testifying at the penalty phase by Mr. Laws' attitude about whether or not he should testify.

I simply do not think there is any factual evidence in the record to warrant any conclusion that Mr. Ruiz was prevented from testifying when he wanted to testify. As a matter of fact, I concluded Mr. Ruiz did not want to testify. He affirmatively told his attorneys he did not want to testify, and that all the attorneys, including Mr. Carpenter, approved of that decision.

In summary, I conclude that these defendants, one of whom is described as very intelligent, another who has above average intelligence, understood and intelligently waived—understood what their rights were to separate representation, separate counsel, separate preparation at all phases of this trial, including the habeas petition, which we are now going through. And they've intelligently waived their rights to any more separate representation than they received.

And, incidentally, in talking about that issue, in reading the transcripts I noticed not only did Mr. Carpenter argue for both defendants, but Mr. Laws and Mr. Cambiano

each argued. So not only did they not receive joint representation in the usual sense of the word, but they got three closing arguments in the penalty phase. So they were certainly represented amply. And if there had been anything that would have been helpful to them, certainly they had every opportunity to bring that out.

With respect to the legal guidelines on testing the performance of counsel, of course, the Eighth Circuit has addressed that any number of times, as has the Supreme Court. But the ineffectiveness of counsel must be such as to deprive a petitioner of Sixth and Fourteenth Amendment rights. And the test has generally been described in a case, one of them, *United States versus Blue Thunder*, by the Eighth Circuit as being, quote, The exercise of reasonable professional judgment, even when hindsight reveals a mistake in that judgment, does not render a lawyer lacking in competence in rendering his services. There is a presumption that counsel has rendered effective assistance. To overcome that presumption, petitioners must shoulder a heavy burden."

And in *Drake and Wyrick*, they also said that, "They must show that their attorney failed to exercise customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that they were prejudiced thereby."

And, of course, those findings are totally absent or completely absent in this case.

And, as I said, there's not one single word of what they should have done differently or what they could have done on behalf of these defendants that they did not do.

The last issue raised by the petitioners involved a comparative review by the Arkansas Supreme Court of the appropriateness of the death penalty in cases, and it is contended that there is an arbitrariness to the assigning of the

death penalty and the methods by which it is reviewed are vague and permit the death sentence under arbitrary circumstances.

The Supreme Court reviewed that in the *Collins* case, *Collins versus State*, and the guidelines were set out in that particular case. In this particular case there has been absolutely no showing that the imposition of the death penalty was because of any passion or prejudice.

There was ample evidence of several aggravating circumstances. There is no finding of any mitigating circumstances, as mentioned in addressing one of the issues earlier.

It is clear that if the Arkansas death penalty is to be applied in a case and in a case as brutal as this one, certainly it is permissible to apply it. There is just a wealth of aggravating circumstances in this case, and it is one where the death penalty should be applied if it is going to be applied in any.

Mr. Heller, is there any legal issue which I have not addressed that you raised?

MR. HELLER: There was one, Your Honor, but I think the Legislature took care of it, and that was that we contended that death by electrocution was cruel and unusual punishment.

Since that time, the Legislature has passed lethal injection statute which provides for inmates currently incarcerated facing the death penalty to have a choice of either electrocution or lethal injection.

For the record, our position would be, the death penalty in and of itself is cruel and unusual punishment.

THE COURT: Well, I know—who is it—Justice Marshall and one other Supreme Court Judge consistently view the death penalty itself as being cruel and unusual punishment, but certainly, that is not the prevailing Supreme Court rule and I will follow the prevailing rule and conclude that it is not unconstitutionally—or has no constitutional infirmity.

MR. HELLER: The only thing I have for the Court, Your Honor, since the Court has rendered a decision on the issues raised in the habeas petition, there currently has been granted by this Court a stay of execution for these two petitioners. Our next legal recourse, obviously, is to appeal to the Eighth Circuit Court of Appeals. I would request that this Court maintain the stay pending the appeal.

MS. FEWELL: Your Honor, may the State speak to that?

THE COURT: Well, sure.

MS. FEWELL: We would object. As I understand, the way these cases have been treated in other circuits, the Court of Appeals may look and see if there is any merit and grant a stay themselves if they are, in fact, —

THE COURT: Well, that's what I was getting ready to say, but if you want to go ahead and make an objection for the record.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Paul Ruiz and Earl Van Denton — Petitioners

VS. — NO. PB C 82 376

A. L. Lockhart, Director, Arkansas Department of Corrections, and Steve Clark, Attorney General of the State of Arkansas — Respondents

ORDER

This cause came on to be heard on the 27th day of April, 1983, and, based on the findings of the Court delivered from the bench, the *habeas corpus* petition is denied.

In the event a notice of appeal is filed, the findings of fact and conclusions of law will be transcribed and submitted to the Eighth Circuit Court of Appeals.

Dated July 19th, 1983.

/s/ William R. Overton
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Paul Ruiz and Earl Van Denton — Petitioners

VS. — PB C 82-376

A. L. Lockhart Director, Arkansas Department of Correction — Respondent

MEMORANDUM AND ORDER

This order addresses the issues raised in the latest motion filed by petitioners asking that their convictions be set aside based upon the decision in *Grigsby v. Mabry.* PB C 78 32 (E.D. Ark., August 5, 1983), and *McCree v. Housewright,* PB C 80 429 (E.D. Ark., August 5, 1983). Petitioners also contend they were denied due process because the Arkansas Supreme Curt failed to accord them a "proper comparative review" of their death penalty sentence.

First, the decision in *Grigsby* and *McCree* is not controlling. In a collateral proceeding such as this, petitioners must demonstrate that the alleged defect in their trial resulted in prejudice to their defense. As pointed out in *Pickens v. Lockhart,* #82-1836, (8th Cir. Aug. 12, 1983), at page 2, footnote 3:

> The district court observed that even if Pickens could show 'cause' for the default, he could not meet the showing of prejudice required by *Sykes* and *United States v. Frady,* 456 U.S. 152, 170 (1982), because the evidence of Pickens' guilt was overwhelming. 542 F. Supp. at 605. We agree with the district court that Pickens has not shown any prejudice from the composition of his jury and that *Grigsby* does not require a remand for a hearing."

Although petitioners raised the objection in the State proceeding that a death qualified jury is guilt prone, the preservation of the issue is of no avail unless they can demonstrate prejudice. This Court has carefully reviewed the transcript of petitioners' trial and is firmly convinced that the proof of their guilt was overwhelming. The evidence presented against petitioners would lead any rational juror, death qualified or not, to the conclusion that petitioners committed the offenses with which they were charged.

The second point argued in the motion of petitioners, that the Arkansas Supreme Court did not do a "proper comparative review", is without merit. Petitioners were ordered to seek another "comparative review" of their sentence after the recent Court of Appeals decision in *Collins v. State*. There is no doubt that the Arkansas Supreme Court has carefully reviewed each death penalty decision in a fashion which is calculated to avoid the arbitrary or capricious imposition of the death penalty. Paul Ruiz and Earl Van Denton have now had the benefit of comparative review twice. A review of the type sought by petitioners is not required by the decisions of the United States Supreme Court. After reviewing the record of petitioners' trial, it is hard to imagine crimes which warrant the death penalty more than those committed by Paul Ruiz and Earl Van Denton. The murders they committed were deliberate, calculated and without any real purpose other than to serve as a demonstration of their indifference to human life. In any event, regardless of which crimes their deeds are compared with, the offenses committed by Paul Ruiz and Earl Van Denton warrant the ultimate penalty provided by law.

The motion is denied. The *habeas* petition is denied and dismissed.

Dated August 24, 1983.

/s/ William R. Overton
United States District Court

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-2027

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

v.

PAUL RUIZ and EARL VAN DENTON — RESPONDENTS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Respondents concur with Petitioner's Statement of the Case.

ARGUMENT

1. WHETHER THE EIGHTH CIRCUIT'S RULING ON THE RESPONDENTS' GRIGSBY CLAIM WAS A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner contends that the issue of death qualified juries (commonly referred to as the Grigsby claim) as enumerated in Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985), should not apply to the case at bar because it was procedurally barred. In particular, the Petitioner contends that though the issue was raised at trial, it was not argued on appeal sufficiently to preserve the issue. Citing Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner contends that the issue was not disposed of on its merits by the State Court and therefore cause and prejudice would have to have been shown for it to be permitted to be introduced in the habeas proceeding pursuant to 28 U.S.C. §2254.

Arkansas follows the rule that if an issue is not raised at trial or on direct appeal, it is waived. See Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980). However, in this proceeding, all requirements were met. It is without dispute that the issue was raised at trial and the hearing was requested. No hearing was granted by the trial court, in fact this point was agreed to by the parties in the Designated Record at page 21. Petitioners contends that the issue was not

properly raised on appeal to the Arkansas Supreme Court and therefore it was waived. A review of the record clearly indicates that it was raised sufficiently on appeal.

Respondents raised seven major issues on appeal, last of which was "Other Objections Raised during the Trial but not Argued on Appeal". The brief of Respondents stated:

> Counsel requested a hearing on whether juries qualified to render a death penalty are prosecution prone. The hearing was denied. R. 502-503. Ruiz feels that he should have had hearing, but in light of this Court's rulings in other cases on this point, it is not raised in this appeal.

It is clear, that Respondent properly raised this issue for the Court's consideration pursuant to its own rules. In the opinion issued by the Arkansas Supreme Court, they did not address the Grigsby issue directly but in ruling upon issues raised in the briefs stated:

> Counsel for Appellants and for Appellee, following our rules have sided and commented on many objections raised below, but not argued on appeal. It would be of no value to list them singly as we find on prejudical errors.

Ruiz v. State, 273 Ark. 94, 106 617 S.W.2d 6, 13 cert. denied 454 U.S. 1093 (1981).

The Eighth Circuit ruled that this was a holding on the merits concerning the Grigsby case.

The Arkansas Supreme Court has, pursuant to Ark. S. Ct. Rule 11(f), required that in any case where death or life

imprisonment is given all errors prejudical to the appellant must be listed and abstracted for the Court's consideration. Obviously, the Court has done this to protect a defendant who faces the worst of all possible penalties, death or life without parole. Certainly, the State cannot require a listing for review of such issues and then claim later that what is listed pursuant to those rules is insufficient. The argument of Petitioners clearly without merit.

A review of the presentation of the issue on appeal further verifies that the issue was raised for the Court's consideration. Respondent claims that based on the Court's prior decisions, not much more needed to be stated except that the issue was raised and it is an issue for reversal. It did not take a crystal ball on behalf of Respondent that the issues would fall on deaf ears. See Hendrickson v. State, No. CR-84-164 (Ark. April 29, 1985); Rector v. State, 280 Ark. 385 659 S.W.2d 168 (1983). Those cases clearly indicate that the position of Respondent concerning the Court's view of the death qualified jury issue was one that they had already decided.

The claim of Petitioner that this interpretation of Rule 11(f) of the Arkansas Supreme Court Rules is unduly burdensome certainly is without merit. When the person's life or death is at stake, the Court should proceed with extreme caution to make sure that the conviction is proper. The only

way the claim of the Petitioner could have merit would be have the issue not been listed at all. Respondent would contend that if that had happened the issue would have been waived, but since it was raised at trial and presented to the Arkansas Supreme Court pursuant to its own rules for consideration, the claim of the Petitioner is without merit and the Court should not consider that issue a reason for granting a Writ.

2. WHETHER THE EIGHTH CIRCUIT'S HOLDING IN MABRY V. GRIGSBY PRESENTS SIGNIFICANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

It goes without saying that the statement of Petitioners concerning the split of the Circuits on the death qualified juror issue is correct. Also, the Grigsby decision is in direct conflict with decisions of the Arkansas Supreme Court. See Hendrickson v. State, 84-164 (Ark. April 29, 1985); Rector v. State, 280 Ark. 385 659 S.W.2d 168 (1983). Quite possibly this split can only be rectified by a decision from this Court. Respondent would contend, however, that the disposition of this issue does not require putting this case on hold pending the outcome of Lockhart v. McRee, U.S.L.W. (U.S. May 29, 1985) (No. 84-1865) and/or Keeten v. Garrison, _____ U.S.L.W. _____ (U.S. Feb. 2, 1985) (No. 84-6187). The Courts can properly rule on this petition prior to making a final disposition on the previous mentioned cases.

3. WHETHER THE EIGHTH CIRCUIT PROPERLY INTREPRETED THIS COURT'S DECISIONS IN APPLYING MABRY V. GRIGSBY RETROACTIVELY.

After the Eighth Circuit returned it decision in Grigsby, it determined that Grigsby should be applied retroactively. In Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985), the issue of retroactivity was addressed and the Eighth Circuit determined that it should be applied to the cases which have previously raised the Grigsby issue. The Eighth Circuit determined, citing Solem v. Stumes, 104 S.Ct. 1338 (1984), that retroactivity depends on three factors:

a) the purpose to be served by the new rule;

b) the extent to which law-enforcement authority have relied on the older rule of law; and

c) the effect on the administration of justice to a retroactive application of the new rule.

104 S.Ct. at 1341.

The Eighth Circuit, compared Grigsby to Witherspoon v. Illinois, 391 U.S. 510 (1968), on occasion in which this Court applied Witherspoon retroactively to protect the "integrity of the process". The Eighth Circuit ruled that the issue in Grigsby was certainly as important, even maybe more so. The Grigsby decision strikes at the very truth finding function of the trial by jury. Woodard at 696. Using the three criteria enumerated above, certainly the purpose to be served by the new rule is to

guarantee defendants that they will be tried by a completely impartial jury. The fact that law enforcement authorities in the past may have relied on previous rulings is not sufficient to deprive defendants of their Sixth Amendment rights to a fair trial. Finally, the effect on the administration of justice, though heavy in this case, does not justify permitting defendants to go to trial with a conviction prone trier of fact. Further, based upon Grigsby there is certainly that possibility that many of the guilty verdicts in the past may have not been accurate. The lives of defendants require that all constitutional safeguards are zealously protected. The additional cost and inconvenience to separate state must not be used to deprive Respondents and others in their situation of their constitutional protections.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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